

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.297/CTK/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

DCIT, Corporate Circle-1(1), Bhubaneswar	Vs.	M/s G.V.V. Constructions Pvt. Ltd., Plot No.358, Saheed Nagar, Bhubaneswar-751007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCG 3649 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

Cross Objection No.36/CTK/2015
(निर्धारण वर्ष / Assessment Year :2010-2011)

M/s G.V.V.Constructions Pvt. Ltd., Plot No.358, Saheed Nagar, Bhubaneswar-751007	Vs.	DCIT, Corporate Circle-1(1), Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCG 3649 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri D.K.Pradhan, CITDR
निर्धारिती की ओर से /Assessee by : None

सुनवाई की तारीख / Date of Hearing : **03/08/2017**
घोषणा की तारीख/Date of Pronouncement **09/08/2017**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

The revenue has filed an appeal and the assessee has filed cross objection against the order of CIT(A)-2, Bhubaneswar in I.T.Appeal No.0593/2013-14, dated 9-3-2015, passed u/s.271(1)(c) & 250 of the Act.

2. None appeared on behalf of the assessee when the matter was called for hearing. Hence, we proceed to dispose off the appeal on the basis of material available on record and the submissions of Id. DR.

3. We take up the revenue's appeal in ITA No.297/CTK/2015, wherein the revenue has raised the following grounds :-

1. *On the facts and in the circumstances of the case, the Id. CIT(A) is not justified in law as well as on facts in cancelling penalty of Rs.13,94,844/- imposed by the AO u/s.271(1)(c).*
2. *On the facts and in the circumstances of the case, the Id. CIT(A) is not justified in law as well as on facts in mis-interpreting that the assessee has not offered inaccurate particulars of income while filing its return of income.*
3. *On the facts and in the circumstances of the case, the Id. CIT(A) is not justified in law in not accepting the findings made by the AO on the issues.*
4. Brief facts of the case are that the assessee is in the business of construction work and filed the return of income declaring total income of Rs.3,41,26,059/-, and the assessment was completed u/s.143(3) of the Act with assessed income of Rs.3,57,56,090/-. Subsequently the AO issued notice u/s.274 of the Act for levy of penalty u/s.271(1)(c) of the Act. The AO in the penalty proceedings observed that the AO in assessment proceedings has made addition of expenses where cash payments exceeding more than Rs.20000/- are paid and transactions are in violation of provisions of Section 40A(3) for Rs.3,52,320/- and the assessee has also not deducted TDS on expenses and violated the provisions of Section 40(a)(ia) of the Act of Rs.8,06,948/- and third addition being the assessee has claimed donation of Rs.20,44,632/- in the profit and loss account and since there is no evidence submitted in support of claim, further the AO found that the assessee has recurring deposits with the Indian Overseas Bank and interest income of Rs.2,26,127/- was not disclosed in the income computation and further the AO was not satisfied with the explanations that the interest income shall be offered on the maturity of deposits. But the Id. AO applied the provisions of Section 69A

of the Act and made addition. Because of the additions, the AO initiated penalty proceedings u/s.271(1)(c) of the Act for concealment of income and furnishing inaccurate particulars. In response, in the penalty proceedings, the assessee filed explanations on 21.8.2013 with the reasons that donations were made to local bodies to maintain goodwill and the AO disallowed the donations as it is not linked with assessee's business and further Id. AR explained that the interest income was recognised as per the accounting policy on recurring deposits and also filed explanations on disallowance u/s.40A(3) and 40(a)(ia) of the Act and such disallowance shall not be a reason for levying penalty u/s.271(1)(c) of the Act but the AO was not satisfied with the explanations and levied penalty u/s.271(1)(c) of the Act and passed the order dated 27.9.2013.

5. Aggrieved by the penalty order the assessee filed an appeal with the CIT(A). In the appellate proceedings the assessee submitted it has not concealed any particulars of income and interest income shall be offered on maturity as per the accounting policy of the company and further disallowance made by the AO u/s.40A(3), 40(a)(ia) of the Act and donations shall not be valid reasons for levying penalty. Ld. CIT(A) considered the submissions, findings of the AO and written submissions filed in course of hearing of proceeding u/s.271(1)(c) of the Act and discussed at length in respect of each addition and relied on the judicial decisions and concluded that these addition of expenditure with respect to 40A(3), 40(a)(ia) of the Act and donation does not giving rise for concealment of income, further on the interest income, the assessee

company is following accounting policy where the interest income shall be offered on the maturity of recurring deposits. Further,. Ld. CIT(A) found that the addition of interest component cannot be a reason for levy of penalty. Ld. CIT(A) dealt on the disputed issue and observed at para (i) & (j) at page 10, 11 of the order and deleted the penalty, which reads as under :-

“i) Under the facts and circumstances as above, initiating and levying penalty u/s 271(l)(c) appears to be an excessive step. Almost all of the enhancements in the instant case are technical in nature and based on numbers and figures extracted from the books of accounts. The Appellant has thereafter walked the extra length and cooperated with the Department by paying all the additional taxes demanded. How such a case can be considered (as done by the AO) as falling within the purview of willful concealment of income or furnishing of inaccurate particulars is unclear. Merely because the assessee agrees to the additions made by the AO to purchase his mental tranquility and has given explanations that are reasonable, satisfactory and not ' proven to be false, it does not mean that his conduct is mala fide. In such a case it would not be sufficient for the department to initiate penalty proceedings or impose penalty against the assessee under section 271(1) (c) of the Act. A mere agreement for addition does not constitute concealment of income and levy of penalty. The mere lack of challenge by the Appellant cannot be held as evidence that culpability or complicity in concealing incomes or furnishing inaccurate particulars has been accepted.

j) While the taxes payable are mandatory dues from the taxpayer, interest amounts receivable from him under the Act can be waived under certain conditions and in certain situations. As against these, the initiation and levy of penalty must be done after judicious consideration, due diligence and honest and unbiased deliberations. There are not automatic and instantaneous levies to be made in a trigger-hungry manner after the initial excitement of making an enhancement (NB: In this case, the enhancements themselves are not above debate). An order of penalty is of quasijudicial nature, and needs to meet the ends of justice and should not descend to a gladiatorial contest suffused by prejudgment, bias and arbitrariness. The AO has not, as required-under law examined the penalty provisions, which need to be construed narrowly and strictly, with the right and proper amount of seriousness. She has recorded no cogent reasons for her decision nor proved the element of mens rea and shown that conditions u/s 271(l)(c) exist as mandated by the

Honourable Supreme Court. She has breezily ignored the various judicial precedents that are applicable in the instant case. A mere inscribing of text and signing off thereunder, as the AO has done in the instant case, that the additions made in the assessment order were "a fit case where the assessee for imposition of penalty" has no evidentiary value. The reasons for the imposing of penalty need to be clear and transparent and speaking, and cannot be allowed to be treated as apodictic as a conclusion true in itself. It needs to be proved demonstrably and cannot be appropriated or arrogated to himself by the AO as a right, whether transcendental and self- initiating or conferred. Such right does not exist and has not been proved by the AO to exist.

8. Consequently, the levy of penalty u/s 271(l)(c) made in the instant case is held to be a case of excessive and arbitrary quasi-judicial overreach by the AO. The appeal is allowed and the penalty imposed of Rs. 13,94,844 is deleted."

6. Aggrieved by the order of CIT(A), the revenue has filed an appeal before the Tribunal.

7. Before us, the Id. DR submitted that the CIT(A) has erred in deleting the penalty irrespective of the fact that the assessee has submitted the inaccurate particulars and concealed the income in respect of additions u/s.40A(3) of the Act, non-deduction of TDS u/s.40(a)(ia) of the Act and donations, therefore, Id. AO was correct in levying the penalty. Similarly, in respect of addition of interest income, the Id. DR emphasized that due to scrutiny proceedings, this income on recurring deposits has been offered by the assessee and, therefore, it is a case of furnishing of inaccurate particulars and concealment of income and prayed for allowing the revenue's appeal. None appeared on behalf of the assessee.

8. We have heard the submissions of Id. DR and perused the material on record. Prima facie, Id. DR's contention that the penalty levied by the AO is based on the disallowance of expenses in respect of 40A(3),

40(a)(ia) of the Act and donations and other being the interest income was not offered by the assessee. The CIT(A) has dealt on the submissions of the assessee and relied on the judicial decisions and deleted the penalty. We found the Id. AO is not clear in decision for levying penalty for concealment of income or inaccurate particulars. Every addition in the assessment proceedings cannot be a gateway for levy of penalty and also levy of penalty is not automatic. We perused the order of the CIT(A), who has dealt on the submissions available on record vis-à-vis explanations of the assessee and deleted the penalty. Further, as per Hon'ble Supreme Court in the case of Reliance Petroproducts (P) Ltd., (2010) 322 ITR 158 (SC), wherein it was observed that "in order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provisions cannot be invoked. We support our view with the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, (2013) 359 ITR 565, wherein it is held as under :-

Held :

Penalty u/s 271(1)(c) is a civil liability. Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities. Willful concealment is not an essential ingredient for attracting civil liability. Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings u/s 271. The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because

of deeming provision. Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings u/s 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B). The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

The imposition of penalty is not automatic. Imposition of penalty even if the tax liability is admitted is not automatic. Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the AO in the assessment order.

Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed. If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity. If the AO has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

Notice u/s 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

The findings recorded in the assessment proceedings in so far as “concealment of income” and “furnishing of incorrect particulars” would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.

(Para 63)

In the light of what we have stated above, it is clear that merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of this addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment. Moreover, the assessee has offered the explanation. The said explanation is not found to be false. On the contrary, it is held to be bonafide. In fact in the assessment proceedings there is no whisper about these concealment. The very fact that the assessee agreed to pay tax and did not challenge the assessment order, it is clear the conduct of the assessee cannot be construed as malafide. Therefore, the Tribunal was justified in setting aside the orders passed by the Appellate Authority as well as the Assessing Authority. In so far as the imposition of penalty is concerned, it is not in accordance with law. No fault could be found with the Tribunal for deleting the penalty.

(Para 64)

Conclusion :

Merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment so as to levy penalty u/s 271(1)(c).

We respectfully follow the judicial decisions and found that the CIT(A) has dealt elaborately on the disputed issue and deleted the penalty. Accordingly, we are not inclined to interfere with the order of CIT(A) and uphold the same and the grounds of appeal of the revenue are dismissed and the appeal of the revenue is dismissed.

9. The assessee has filed cross objection No.36/CTK/2015, supporting the order of CIT(A). Since we have dismissed the appeal of the revenue and uphold the decision of CIT(A) in deleting the penalty, therefore, the cross objection filed by the assessee has become infructuous and is dismissed.

10. Thus, appeal of the revenue i.e ITA No.297/CTK/2015 and cross objection of the assessee i.e. CO No.36/CTK/2015 are dismissed.

Order pronounced in the open court on this 09/08/2017.

Sd/-

(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 09/08/2017

प्र. कु. मि / PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-

(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

आदेशानुसार / BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack